

GENERAL OUTLINES OF PRACTICE
UNDER THE
CALIFORNIA CODE OF CIVIL PROCEDURE.

JOSEPH HUTCHINSON.

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GENERAL OUTLINES OF PRACTICE

UNDER THE

CALIFORNIA CODE OF CIVIL PROCEDURE.

SYLLABI OF LECTURES

AT THE

Leland Stanford Jr. University.



JOSEPH HUTCHINSON

OF THE SAN FRANCISCO BAR.

MAY, 1895.

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JOSEPH HUTCHINSON, Esq.,
SAN FRANCISCO, CAL.:

My Dear Sir:

As day by day you have spoken to us, and have added outline to outline of your lectures, I have more and more felt the debt we owe you. And in thanking you for what you have done may I say that we appreciate not only the result of your work, but also that your lectures were prepared on short notice, while you were engaged in your professional duties, and as a gift by a lawyer to those who are studying law.

You tell me you propose to gather your Outlines into a volume and give a copy to each of the law students. May I ask that this note be inserted in it, and may I say that it in part expresses our common sense of obligation to you.

Believe me, with respect,

Very truly yours,

NATHAN ABBOTT.

Law Department Leland Stanford Jr. University, May 17, 1895.



An Alumnus of the University of California, the author presents this volume of syllabi to the law students of the Leland Stanford Jr. University, as a token of the hearty sympathy existing between the two great Universities of the Pacific Coast, and in recognition of the inspiration and impulse which the older institution has received from the younger.



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SYLLABUS OF LECTURE I.

APRIL 23, 1895.

SUBJECT:

CONSTITUTIONAL ORIGIN OF PROCEDURE;

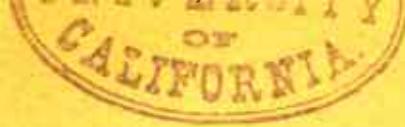
DEFINITION;

GENERAL SCHEME OF OUTLINES;

RELATION OF REFORMED TO OLD SYSTEM;

HISTORY OF THE REFORMED PROCEDURE IN CALIFORNIA.





General Outlines of Practice

UNDER THE

CALIFORNIA CODE OF CIVIL PROCEDURE.

Due Process of Law.

Guaranteed by the Constitution of the United States.

Constitution of the U. S., Fifth Amendment.

Definition.

Hare, American Constitutional Law, Vol. 2, page 750.

Hurtado v. California, 110 U. S., 516.

Guaranteed by the Constitution of the State of California.

See Constitution of 1879, Art. 1, Sec. 13.

Definition of Procedure.

Law of Procedure as distinguished from the Law of Substantive Rights and Obligations.

Criminal Procedure distinguished from Civil Procedure.

C. C. P., Art. 31.

Also see Penal Code.

Analysis of the Code of Civil Procedure.

(See Summary of Contents, pages VII–XI,
Deering's Code Civil Procedure.)

Part I.

“Of Courts of Justice.”

Part II.

“Of Civil Actions.”

Part III.

“Of Special Proceedings of a Civil Nature.”

Part IV.

“Of Evidence.”

SCOPE OF THESE OUTLINES.

Will not treat of Part IV above.

Will treat only meagrely of Part I above.

Chiefly devoted to Part II and Part III above.

Arrangement.

The arrangement of Part II and Part III will not be followed in these outlines, but what is considered a more logical and intelligible order adopted and hereafter explained.

Historical.

California Code of Civil Procedure embodies what is known as the “Reformed Procedure.”

The three stages in the historical development of National Jurisprudence.

(See Sir Henry Maine's *Ancient Law*; Pomeroy's *Remedies and Remedial Rights*, page 6, Art. 7.)

1. Use of Fictions.
2. Introduction of Equitable Conceptions.
3. Positive Legislation.

COMMON LAW ACTIONS.

Case.
Trover.
Covenant.
Debt.
Assumpsit.
Ejectment.
Detinue.
Replevin.

(Pomeroy's *Remedies and Remedial Rights*, Art. 21.)

Chancery Procedure.

(*Ibid.*, Art. 22.)

Disadvantages of the old Common Law Procedure.

(See Stephen on *Pleading*, Tyler's Edition, 1893, pages 392–398.)

1. Tendency to decide upon mere form.
2. Narrowing effect of rules, compelling singleness of issue.

3. Too great scope given to the general issue.
4. Excessive subtlety and needless precision.

Results.

1. Expensive amendments.
2. Sometimes absolute failure of justice on points of mere form.

General Characteristics of the Reformed Procedure.

(Pomeroy on Remedies and Remedial Rights, Art. 28.)

The Reformed Procedure in England.

The reform movement culminated in England, in 1873.

(Pomeroy, Art. 23.)

Reformed Procedure in New York.

1. The Constitution of 1846.
2. The Commission of 1847.
3. The Commissioners' Code of 1848.

(Albany Law Journal, Vol. 19, p. 292.)

The Reformed Procedure in California.

The "Practice Act" of April 29, 1851.

(See Compiled Laws, 1850-1853, page 519.)

Taken almost bodily from the New York Code of Civil Procedure of 1848.

Substantially the same as the present Code of Civil Procedure.

Extensive amendments to the "Practice Act" from 1851 to 1873.

The Commission of 1868.

(See Statutes of 1867-1868, page 435.)

The Commission of 1870.

(Statutes 1869-1870, page 774.)

Duties of this Commission.

Not directed by the Statute to make Codes.

Personnel and Methods of Work.

Codes Adopted March 12, 1872.

Influence of David Dudley Field.

"Adopt the Code and amend it afterwards."

Extensive amendments immediately following its passage.

The Code Examiners of 1873.

Stephen J. Field,

Jackson Temple,

John W. Dwinelle.

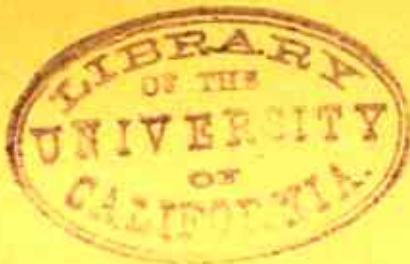
Their methods. (See California Code Examiners' Report, 1873, San Francisco Law Library.)

The Report of the Code Examiners.

Amendments since 1874.

Present condition of the Code.

The Commission of 1895.



SYLLABUS OF LECTURE II.

APRIL 26, 1895.

SUBJECT:

TRIBUNALS AND JURISDICTION.

CONSTITUTIONAL ORIGIN AND DESCRIPTION OF SAME.

THE SUPERIOR COURT,

ITS OFFICERS, RECORDS AND FILES.

THE JUDGMENT,

AS CENTRE FOR CLASSIFICATION OF ALL PROCEDURE.

CONSTITUTIONAL PROVISIONS RELATING TO PROCEDURE.

Due Process of Law. Art. 1, Sec. 13.

Jury Trial Guaranteed. Art. 1, Sec. 7.

Three fourths of Jury may render Verdict in Civil Actions. *Ibid.*

Waiver of Jury Trial. *Ibid.*

Abolishing imprisonment for debt, except in certain cases. Art. 1, Sec. 15.

Prohibiting local or special laws relating to certain Matters of Procedure. Art. 4, Sec. 25.

Judges not to charge Juries with respect to Matters of Fact. Art. 6, Sec. 19.

Permitting Suits against the State. Art. 20, Sec. 6.

The Constitution and Jurisdiction of the Courts derived entirely from the Constitution.

List of Tribunals.

(Const., Art. 6, Sec. 1; C. C. P., Sec. 33.)

The Court of Impeachment.

(C. C. P., Secs. 36-39.)

(Penal Code, Secs. 737 to 753.)

Constitution of the Supreme Court.

(Const., Art. 6, Sec. 2; C. C. P., Secs. 40 to 49.)

Election, Salary, Terms, etc.

(Const., Art. 6, Sec. 3; Pol. Code, Sec. 736; C. C. P., Sec. 47.)

Supreme Court Commission.

(Statutes 1885, page 101; Statutes 1889, page 13.)

Jurisdiction of Supreme Court.

(Const., Art. 6, Sec. 4; C. C. P., Secs. 50 to 52.)

Constitution of the Superior Court.

(Const., Art. 6, Sec. 6; Pol. Code, Secs. 737, 738; C. C. P., Secs. 65-74.)

Jurisdiction of Superior Court.

(Const., Art. 6, Sec. 5; C. C. P., Secs. 75 to 79.)

General Constitutional Provisions relating to the Courts.

(Const., Art. 6, Secs. 5, 22, 23, 24; C. C. P., Secs. 73, 76, 78.)

Constitution, Jurisdiction, etc., of Justices' and other Inferior Courts.

(Const., Art. 6, Secs. 11 and 13; C. C. P., Secs. 85 to 121.

Inferior Municipal Courts.

(See General Municipal Incorporation Act, Stats. 1883, page 93, and numerous amendments.)

(See, also, special Acts organizing specific towns prior to 1879.)

These outlines omit detailed consideration of the procedure of Justices' Courts and inferior tribunals.

THE SUPERIOR COURT.

Officers.

(Aside from Judge and Jury.)

Clerk	Const., Art. 6, Sec. 14.
Bailiff.	Pol. Code, Sec. 4,176, Sub. 4.
Phonographic Reporters.	C. C. P., Secs. 268-274.
Court Commissioners.	C. C. P., Secs. 258-259.
Special Referees.	C. C. P., Secs. 638-645.
Attorneys and Counselors-at-Law.	C. C. P., Secs. 275-299.

(Duties of Attorneys; Disbarment Proceedings. *Ibid.*)

Records and Files of the Superior Court.

(In the Custody of the Clerk.)

The Record Books.

General Indexes. Description and purposes.

Register. (C. C. P., 1,052.) Description, purposes and illustration.

Blotter or rough Minute Book. } Description,
 Engrossed Minute Book. } purposes and
 } illustration.

Trial Calendar Book. (C. C. P., Art. 593.)

Law and Motion Calendar Book. Description and purposes.

Execution Book. (C. C. P., 683.) Description and purposes.

Daily Order Book. Description and purposes.

Judgment Record. (C. C. P., 668.) Description, purposes and illustration.

Judgment Docket. (C. C. P., Secs. 671, 672.) Description, purposes and illustration.

The Files.

(Description, purposes and illustrations.)

Stipulations.

Notices.

Demands.

Appearances.

Orders.

Wrists.

Summons.

Affidavits.

Depositions.

Remittitur.

Cost Bills.

Statement of the Case on Motion for New Trial.

The Judgment and Judgment-Roll.

THE JUDGMENT.

The object of all procedure is to obtain a final judgment.

The judgment is the final official determination of the controversy.

“The very voyce of law and right.”

(Co. Litt., 39 α ; Freeman on Judgments,
4th Ed., Sec. 1.)

“The judgment is the end of the law.”

(Blystone *v.* Blystone, 51 Pa. St., 373;
Freeman, *ibid.*)

(Also Gregory *v.* Nelson, 41 Cal., 278;
Black on Judgments, Vol. I., Sec. 1.)

“A judgment is the final determination of the rights of the parties in an action or proceeding.”

(C. C. P., Sec. 577.)

Import of the Judgment.

(See Black on Judgments, Art. 4; C. C. P., 1,908-1,911; 1,916, 1,917.)

1. Establishes indisputable obligation.
2. Gives right to execution.
3. Creates estoppel or bar.
4. May constitute evidence or source of title.
5. When docketed, creates a lien on real estate.

From this point the treatment will relate chiefly to

Civil Actions (C. C. P., Secs. 21, 22).

Later will come brief treatment of
Special Proceedings of a Civil Nature (C. C. P., Sec. 23).

Classes of Judgments.

(This classification is superficial and unimportant).

1. Judgment by confession. C. C. P., 1,132 to 1,134.
2. Clerk's default. C. C. P., 585, Sub. 1.
3. Court default judgment. C. C. P., Sec. 585, Subs. 2 and 3.
4. Judgment after demurrer to complaint sustained and failure to answer. C. C. P., Sec. 432.
5. Judgment of dismissal. C. C. P., 581, as amended in 1895.

Sub-Classes.

6. Judgment on arbitration. C. C. P., Sec. 1,286.
7. Judgment on submitted case. C. C. P., Secs. 1,138 to 1,140.
8. Judgment on offer to compromise. C. C. P., Sec. 997.
9. Judgment in foreclosure of mortgage on real estate. C. C. P., Sec. 726.
10. Judgment in action to abate a nuisance. C. C. P., Sec. 731.

Rules as to Entry of Judgment.

1. After verdict judgment should be entered within twenty-four hours. C. C. P., Sec. 664.

Must be in the Judgment Book. C. C. P., Sec. 668.

2. If party obtaining judgment does not enter within six months, the adverse party may take a dismissal. C. C. P., Sec. 581, Sub. 6.

Rules as to Satisfaction of Judgment.

1. When execution is returned satisfied.

2. Filing satisfaction acknowledged by judgment creditor in same manner as conveyance of real estate.

3. Creditor's endorsement on the face of the record.

4. By attorney's endorsement.

C. C. P., Sec. 675.

Attorney's authority herein.

(C. C. P., Sec. 283, Sub. 2.)

ALL PROCEDURE PROPERLY CLASSIFIED AND GROUPED ABOUT THE JUDGMENT.

I.

Proceedings Prior to Judgment.

1. Proceedings for the purpose of acquiring jurisdiction.

The Summons; its form, contents, method of issue, service and return ; appearances.



2. Proceedings for the purpose of determining the nature of the controversy, making up the issues and preparing for the introduction of evidence at the trial.

Here, of pleadings and motions and orders relating thereto.

3. The Trial.

4. Provisional remedies, pending the litigation, for the purpose of securing the payment of the judgment or preserving the *status quo*.

Here, of *lis pendens*, arrest and bail, claim and delivery, injunction, attachment, receivers, deposit in Court, preserving testimony, depositions, interlocutory judgments and references.

II.

Proceedings Subsequent to the Judgment.

1. Stay.
2. Costs.
3. Execution.
4. Proceedings in aid of execution.
5. Motion for new trial.
6. Appeal.

SYLLABUS OF LECTURE III.

APRIL 30, 1895.

SUBJECT:

PROCEEDINGS BEFORE FILING COM- |
PLAINT.

COMPLAINT.

RULES OF PLEADING.

APPEARANCES.

SUMMONS.



FIRST.

PROCEEDINGS PRIOR TO JUDGMENT.

ONE.

PROCEEDINGS FOR THE PURPOSE OF DETERMINING THE NATURE OF THE CONTROVERSY, MAKING UP THE ISSUES AND PREPARING FOR THE INTRODUCTION OF EVIDENCE AT THE TRIAL.

(This is taken up before the summons, because under our practice complaint must be filed before summons issues.)

I.

PROCEEDINGS BEFORE FILING COMPLAINT.

1. Appointment of Guardian *ad litem*. (C. C. P., Art. 372.)
2. Obtaining Permission to Sue Officer of Court. (Insolvent Act, 1880, Article 6. Deering's C. C. P., p. 680; Adams *v.* Woods, 9 Cal., 24.)
3. Obtaining Permission for Officer of Court to Bring Suit. (C. C. P., 568.)

II.

THE COMPLAINT.

1. Civil Actions Commenced When Complaint is Filed. (C. C. P., 405.)

2. Contents of Complaint.

A.

The Name of the Court. Illustration.

C. C. P., 474, § 1.

B.

The Place of the Court.

C. C. P., 474, § 1.

Venue.

Place of Trial fixed by C. C. P., 392-395; see, also, Constitution of 1879, Article VI, § 5.

Suits Against Corporations.

Constitution, Article 12, Section 16.

Challenged as Unconstitutional, but Upheld.

Lewis *v.* S. P. Coast R. R. Co., 66 Cal., 209.

What is the Residence of a Corporation?

Jenkins *v.* Cal. Stage Co., 22 Cal., 538.

Apparently overruled in Cal. S. R. Co. *v.* S. P. R. R. Co., 65 Cal., 394;

But affirmed, again, in *Cohn v. C. P. R. R. Co.*, 71 Cal., 488.

Residence of Municipal Corporation.

Buck v. City of Eureka, 97 Cal., 135.

McSherry v. Pa. C. G. M. Co., 97 Cal., 643.

Residence of Foreign Corporation; Has None.

Thomas v. Placerville G. Q. M. Co., 65 Cal., 600.

Suit Against an Association, Not a Corporation.

Constitution, Article 12, Section 16.

The subject of change of venue will be taken up later at the point in the proceedings where the motion for that purpose must be made.

C.

**Names of the Parties to the Action—
Title of the Action.**

C. C. P., 474, § 1.

C. C. P., Secs, 367-390.

i. The plaintiff must be the real party in interest.

C. C. P., Article 367.

Exceptions.

C. C. P., 368-371.

2. Married woman as party.
C. C. P., Article 370.
3. Infant, insane or incompetent persons as party.
C. C. P., 372.
4. Party plaintiff in case of seduction.
C. C. P., 375.
5. Party plaintiff in case of injury to or death of minor child or ward, caused by tort.
C. C. P., 376.
6. Party plaintiff in action for damages for death, by tort, of person not a minor.
C. C. P., 377.

Who May Be Joined as Plaintiffs.

All parties having an interest in the subject of the action.

C. C. P., 378.

Who May be Parties Defendant.

Anyone who has or claims any interest in the controversy, adverse to the plaintiff, or who is a necessary party to the complete determination and settlement of the question involved in the suit.

C. C. P., Sec. 379.

Associate Defendants Sued Under Common Name.

C. C. P., Sec. 388.

Substitution in Case of Death or Transfer of Interest.

C. C. P., 385.

Unwilling Plaintiff May be Made Defendant.

C. C. P., 382.

One Suing or Defending for the Benefit of All.

C. C. P., 382.

Intervenors.

C. C. P., 387.

Court May Bring in New Parties.

C. C. P., 389.

Method of Designating Certain Parties.

Corporations.

Co-partnerships.

Parties in official or trust capacity.

Use of Fictitious Names.

C. C. P., 474.

D.

The statement of the facts constituting the cause of action, in ordinary and concise language

C. C. P., Sec. 426, Subdivision 2.

Definition of Cause of Action.

(Pomeroy's Remedies and Remedial Rights, Art. 453.)

Analysis.

- Primary right of plaintiff.
- Corresponding primary duty of defendant;
- Defendant's breach of plaintiff's primary right;
- Plaintiff's primary right springing from the breach.

Rules of Pleading So Far as They Relate to the Statement of the Plaintiff's Cause of Action.

“Logical directness and simplicity of statement
“should always be observed in the pleading.”

Sanderson, J., in *Miles v. McDermott*, 31
Cal., 274.

“Two of the leading ends contemplated by the
“Code are simplicity and economy. As contrib-
“uting to the attainment of these ends, it was the
“intention of the Code to require the pleadings
“to be so framed as not only to apprise the par-
“ties of the facts to be proved by them, but to
“narrow the proofs upon the trial.”

Burnett, J., in *Piercy v. Sabin*, 10 Cal., 27.

Detailed Rules.

I.

Facts only must be pleaded.

Green v. Palmer, 15 Cal., 412.

This Rule excludes :

- a. Argumentative matter. (*Ibid.*)
- b. Hypothetical matter. (*Ibid.*)
- c. Evidentiary matter. (*Ibid.*)

See, also, *Patterson v. Keystone Mining Co.*, 30 Cal., 364.

Larco v. Casaneuava, 30 Cal., 566.

- d. Matter of opinion.

Snow v. Halstead, 1 Cal., 361.

- e. Legal conclusions.

Green v. Palmer, 15 Cal., 415.

Piercy v. Savin, 10 Cal., 29.

Dye v. Dye, 11 Cal., 169.

Dutch Flat Co. v. Mooney, 12 Cal., 534.

- f. Averment by way of recital.

Shafer v. Bay River, etc., 4 Cal., 294.

- g. Anticipation of defenses.

Smith v. Richmond, 19 Cal., 484.

- h. All irrelevant and redundant matter.

C. C. P., 453.

.2.

Those facts and those only must be stated which constitute the cause of action.

Green v. Palmer, 15 Cal., 415.

This includes the following rules :

- a. All material facts must be alleged. (*Ibid.*)

b. Nothing must be alleged which is not material. (*Ibid.*)

Test of materiality. (*Ibid.*, and also C. C. P., 463.)

c. Only ultimate facts should be stated.

Green v. Palmer, 15 Cal., 415.

Grewell v. Walden, 23 Cal., 169.

3.

The language must be ordinary, as distinguished from technical.

C. C. P., 426, Subdivision 2.

Bowen v. Aubrey, 22 Cal., 570.

4.

The language should be concise.

C. C. P., 426, Subdivision 2.

Green v. Palmer, 15 Cal., 418.

5.

Statements must be made unequivocally, leaving nothing to inference.

Moore v. Besse, 30 Cal., 570.

Green v. Palmer, 15 Cal., 412, as the Leading Case.

Decided in 1860.

By Stephen J. Field, C. J.; Baldwin, J., concurring.

Follows a manual published by New York Code Commissioners.

Miscellaneous Rules and Illustrations.

Facts constituting fraud must be set up with great particularity.

Kent v. Snyder, 30 Cal., 667.

Pleading document in *haec verba* preferable to pleading by legal effect.

Joseph v. Holt, 37 Cal., 253.

The whole pleading will be construed together.

Alemany v. Petaluma, 38 Cal., 553.

Only facts alleged can be proved.

Hicks v. Murray, 43 Cal., 519.

Improper to omit matters of substance and attempt to supply them by reference to exhibits.

City of Los Angeles v. Signoret, 50 Cal., 298.

The pleader presumed to state his facts as favorably for himself as possible.

Rogers v. Shannon, 52 Cal., 99.

Pleadings construed most strongly against pleader, and no intendments can be indulged in its aid.

Callahan v. Loughran, 102 Cal., 476.

Allegations and proofs must agree.

Murdock v. Clarke, 59 Cal., 683.

Defects in the complaint may be cured by averments in the cross complaint.

Cohen v. Knox, 90 Cal., 266.

Or by the answer.

Shiveley v. Semi-Tropic Land and Water Co., 99 Cal., 259.

Justice Field's Departures from Principles of Code Pleading.

I.

Old form of common counts allowed.

Freeborn v. Glazer, 10 Cal., 337.

2.

Allegations of conclusions of law permitted in actions in ejectment.

Payne v. Treadwell, 16 Cal., 242.

Uniting Causes of Action.

C. C. P., 427.

Pleading the Same Cause in Different Forms.

Wilson v. Smith, 61 Cal., 209.

E.

Demand for Relief—Prayer.

C. C. P., 426, Subdivision 3.

Importance in View of Defendant's Possible Default. (C. C. P., 580.)

Signature to Complaint.

Verification.

(C. C. P., 446.)

Advantage gained by verification. Puts defendant upon specific denial. (C. C. P., 437.)

Complaints in certain cases must be verified:

Examples.

Injunction. (C. C. P., 527.)

Forcible and unlawful entry and detainer. (C. C. P., 1,175.)

To enforce liens against steamers, vessels and boats. (C. C. P., 815.)

Supplemental Complaint.

(C. C. P., 464.)

TWO.

METHOD OF ACQUIRING JURISDICTION OF THE PARTIES.

I.

Appearance.

(C. C. P., 416.)

Who may enter.

Form.

Authority of attorney. (C. C. P., 283.)

Effect as to time of pleading.



II.

Summons.

Contents.—C. C. P., 407.

Importance of correct form, contents and service of summons, in view of defendant's possible default.

The summons must contain all required by the Statute, whether deemed needful or not.

Lyman v. Milton, 44 Cal., 630.

Ward v. Ward, 59 Cal., 139.

Endorsement of attorney's name.

Shinn v. Cummins, 65 Cal., 97.

Only substantial departure from the requirements of the Statute will be fatal. (*Ibid.*, C. C. P., 4.)

General statement of the nature of the action sufficient.

Bewick v. Muir, 83 Cal., 368.

Mere variance in form of words, not misleading, will not invalidate.

Clark v. Palmer, 90 Cal., 504.

Behlow v. Shorb, 91 Cal., 141.

All names of the parties must be stated; the use of "*et al.*" not sufficient to supply this omission.

Lyman v. Milton, 44 Cal., 630.

Particular Forms of Summons Required in Certain Cases.

Partition of real property. (C. C. P., 756.)

Proceedings against joint debtor. (*Ibid.*, 989-994.)

Forcible and unlawful entry and detainer. (*Ibid.*, 1,167.)

Eminent domain. (*Ibid.*, 1,245.)

Service of Summons.

By whom served. (C. C. P., Sec. 410.)

Copy of complaint must be served with each copy of summons. (*Ibid.*, as amended in 1893; former rule.)

Upon whom served. (C. C. P., 411.)

Service by publication. (C. C. P., 412.)

Affidavits required preliminary to service by publication. (*Ibid.*)

Requisites of affidavit and order; provisions as to service by publication strictly construed. Affidavit and order must both state facts showing diligence; also fact that the defendant is a necessary party.

Repeating language of the statute is not sufficient.

Ricketson *v.* Richardson, 26 Cal., 149.

No showing of diligence necessary as to non-resident defendant.

Anderson *v.* Goff, 72 Cal., 69.

Service by publication on non-resident only good as to property attached within the State. (*Ibid.*)

This rule is based upon considerations arising out of the Constitution of the United States.

Pennoyer v. Neff, 95 U. S., 714.

Does not apply as to status of parties in, for instance, divorce proceedings, or where the action may be considered *in rem*.

Estate of Newman, 75 Cal., 213.

Service by telegraph. (C. C. P., Article 1,017.)

Time of issue of summons. Within one year from the commencement of the action, or suit dismissed.

Reynolds v. Page, 35 Cal., 296.

Time within which service may be made. (C. C. P., 581, Sub. 7.)

Construed in *Murray v. Gleeson*, 100 Cal., 511.

Proof of Service.

(C. C. P., 415.)

Doerfler v. Schmidt, 64 Cal., 265.

SYLLABUS OF LECTURE IV.

MAY 3, 1895.

SUBJECT:

STEPS ON BEHALF OF DEFENDANT.

PRELIMINARY MOTIONS; DEMURRER;
ANSWER.

THE ISSUES.

THE TRIAL.

EXCEPTIONS AND FINDINGS.





PROCEEDINGS PRIOR TO JUDGMENT.

(Continued.)

STEPS ON BEHALF OF DEFENDANT AFTER SERVICE.

I.

Motion to Quash Service.

This must be by special appearance ; general appearance waives.

Form of Special Appearance and Notices.

II.

Motion for Change of Venue.

C. C. P., 396-397.

When must be made.

Affidavit of Merits.

Buell *v.* Dodge, 63 Cal., 553.

Insufficient affidavit.

Nickerson *v.* Cal. Raisin Co., 61 Cal., 268.

Written demand.

C. C. P., 396.

Notice of Motion.

Grounds of Motion.

C. C. P., 397.

When changed as matter of right.
When discretionary.

Watts v. White, 13 Cal., 321.

III.

Motion to Strike out Parts of Complaint.

Grounds.

C. C. P., 453.

Form of Notice.

Superior Court Rules, San Francisco.

IV.

Demurrer to Complaint.

Time for Demurrer.

C. C. P., 430.

Grounds of Demurrer.

Ibid.

Form of Demurrer. Illustration.

Raises issue of law.

Cook v. De la Guerra, 24 Cal., 238.

Admits truth of facts alleged.

But only such as are issuable and well pleaded.

*Branham v. Mayor and Common Council
of San Jose*, 24 Cal., 585.

Should distinctly specify grounds.

C. C. P., 431.

Should not state facts.

Cook *v.* De la Guerra, 24 Cal., 238.

Distinction between Special and General.

Harnish *v.* Bramer, 71 Cal., 155.

Demurring and Answering simultaneously.

C. C. P., 431.

Raising Grounds of Demurrer by Answer.

C. C. P., 433.

Failure to demur waives.

What grounds.

C. C. P., 434.

Effect of Overruling.

C. C. P., 476.

Effect of Sustaining.

Ibid.

ANSWER.

C. C. P., 437.

Denials.

(a) General. C. C. P., 437, Sub. 1.

(b) Specific. (*Ibid.*)

Rules.

Only material allegations should be denied.

Ibid.

Complaint unverified, general denial permissible.

C. C. P., 437, Sub. 2.

General denial puts in issue material allegations.

Ibid.

Complaint verified, denials must be specific.

Ibid.

Specific denials must be made positive, or according to information or belief.

Ibid.

Defendant without information or belief may deny on that ground.

Ibid.

Negatives Pregnant.

See Stephens on Pleading, 3rd American Edition, 1893, page 335-6.

Classes of Allegations which Need not be Denied.

Argumentative.

Hypothetical.

Evidentiary.

Matter of Opinion.

Legal Conclusions.

Recitals.

Anticipated Defenses.

Irrelevant and redundant matter.

Ambiguous, unintelligible and uncertain matter.

Immaterial matter.

Allegations of Facts not Ultimate.

Allegations equivocal and by way of inference.

Danger of Leaving Imperfect Allegations Undenied.

Advantages and Disadvantages of Leaving Plaintiff's Pleading Imperfect.

Defects Cured after Verdict or Judgment.

New Matter.

C. C. P., 437, Sub. 2.

- (a) Constituting a defense.
- (b) Counter-claim.

Definition of "New Matter."

Douglas *v.* Haberstro, 25 Hun., 262.

Pomeroy's Remedies and Remedial Rights,
Sec. 691.

New matter confesses and avoids all material allegations of the complaint. *Ibid.*, 692.

Illustrations of New Matter.

Payment.

Arbitrament and award.

Former recovery.

Usury.

Want of consideration.

Breach of warranty.

Estoppel by judgment.

Statute of Limitations.

Rule as to Method of Setting Forth New Matter.

Same rules should be observed as in making statement of cause of action in complaint.

Pomeroy's Remedies and Remedial Rights,
Article 687.

The Counter-Claim.

Requisites.

C. C. P., 438.

Definition of "Transaction" and "Subject of the Action."

Pomeroy's Remedies and Remedial Rights,
475; 487-490; 461-474; 737-774.

Narrowness of New York Decisions.

Broader Tendency in California.

See *Story & Isham Commercial Co. v. Story et al.*, 100 Cal., 30.

Illustrations.

Penalty for Omitting to Set up Counter-Claim.

C. C. P., 439.

Rules of Pleading Counter-Claim.

Should announce itself a counter-claim.

In setting forth facts, should observe the same rules as in making statement of cause of action in complaint.

Should close with appropriate prayer.

Pomeroy's Remedies and Remedial Rights,
Article 516; 738; 748.

Different Grounds of Defense and Counter-
Claim must be Separately stated.

C. C. P., 441.

Pleading Inconsistent Defenses.

Bell *v.* Brown, 22 Cal., 671.

The Issues.

Demurrer raises issue of law.

C. C. P., 589.

Material Allegations of Complaint Controverted
by Answer raises Issue of Fact.

C. C. P., 590, Sub. 1.

All new matter in the answer is deemed controverted and thus raises an issue of fact.

Ibid., Sub. 2; C. C. P., 462.

Material Allegations of Complaint not Controverted taken as true.

C. C. P., 462.

Cross-Complaint.

C. C. P., 442.

Ready for Trial.

Method of Sifting out the Issues.

The Trial.

C. C. P., 558 to 636.

Will not discuss details of the trial.

Exceptions.

Definition.

C. C. P., 646.

When taken ; purpose.

C. C. P., 646.

No particular form necessary.

C. C. P., 648.

Exception to sufficiency of evidence must be specific.

Ibid.

Exception must be signed by Judge and filed.

C. C. P., 649.

Exceptions to isolated rulings before trial.

Exceptions during the conduct of the trial.

C. C. P., 650.

Findings.

Decision of Court must be in writing.

C. C. P., 632.

Facts found and conclusions of law separately stated.

C. C. P., 633.

Waiver of findings.

C. C. P., 634.

Losing party should always insist on findings.

Morrison *v.* Lods, 39 Cal., 381.

Rules as to Findings.

See Hayne on New Trials and Appeals,
Articles 240-242.

- Must cover every material issue.
- Not required upon immaterial issue.
- Must state facts as stated in the pleadings.
- Must not be conclusions of law.
- Must not be statements of evidence.
- Must be of ultimate facts ; or,
Secondary facts from which the ultimate facts
necessarily result.
- Should not contain argument or hypothesis.
- Should not be contradictory.

General Findings Permitted.

It is permissible to find "That the facts stated
"in the plaintiff's complaint are true, and the
"facts stated in the defendant's answer are not
"true."

McEwen *v.* Johnson, 7 Cal., 260.

Findings by reference often held insufficient
and are dangerous.

See Hayne, Article 242.



SYLLABUS OF LECTURE V.

MAY 7, 1895.

SUBJECT:

PROVISIONAL REMEDIES.

LIS PENDENS.

INJUNCTION.

ATTACHMENT.

ETC.

PROCEEDINGS SUBSEQUENT TO JUDG-
MENT.

STAY; COSTS; EXECUTION.

PROVISIONAL REMEDIES,
APPLIED PENDING THE LITIGATION FOR THE PURPOSE OF
SECURING THE JUDGMENT OR PRESERVING
THE STATUS QUO.

I.

LIS PENDENS.

C. C. P., 409.

Who may file; plaintiff or defendant claiming affirmative relief.

In what classes of cases.

Contents.

Names of parties;

Object of action or defense;

Description of property.

Effect.

Illustrations.

Casebolt *v.* Lewis.

Old common law rule of *lis pendens*, mere pendency of action gives constructive notice.

Parties named by fictitious names not affected.

Compulsory in partition suit.

C. C. P., 755.

II.

ARREST AND BAIL.

C. C. P., 478-504.

Cases in which permissible.

C. C. P., 479.

Element of fraud, concealment or flight must be present.

Purpose.

To require defendant to render himself amenable at all times to the process of the Court during pendency of the action, and to such as might be issued to enforce the judgment therein.

C. C. P., 487.

Steps.

Affidavit.

C. C. P., 481.

Order.

C. C. P., 480.

Undertaking.

C. C. P., 482-3.

Defendant may relieve himself by giving bond or depositing money.

C. C. P., 486.

This process seldom used ; dangerous. Liability of plaintiff on his undertaking ; liability to action for false imprisonment.

Forms.

III.

CLAIM AND DELIVERY.

Replevin.

Cases where applicable.

C. C. P., 509, 510.

Procedure.

C. C. P., 509-520.

Forms.

Illustrations.

IV.

INJUNCTION.

C. C. P., 525-533.

Definition.

C. C. P., 525.

Cases where allowable.

C. C. P., 526.

Illustrations and Rules.

Opening of road enjoined.

Curran v. Shattuck, 24 Cal., 427.

Waste by mortgagee enjoined.

Robinson v. Russell, 24 Cal., 467.

Sheriff sale which might cloud his title enjoined.

Englund v. Lewis, 25 Cal., 337.

Injunction to restrain defendant from removing minerals from patented lands.

People v. Morrell, 26 Cal., 336.

Injunction to prevent tenant from removing building.

Perrine v. Marsden, 34 Cal., 14.

Injunction to preserve mining property pending litigation.

Hess v. Winder, 34 Cal., 270.

Injunction to restrain diversion of water.

N. C. & S. C. Co. v. Kidd, 37 Cal., 282.

To prevent the erection of wharves which will cut off premises from navigable waters of the bay.

Crowell v. Martin, 43 Cal., 605.

Prevent sale of homestead on execution.

Miller v. Little, 47 Cal., 349.

To restrain continued trespasses.

Mechanics' Foundry of S. F. v. Ryall, 62 Cal., 416.

Injunction denied in this case because it did not appear that the defendant was insolvent, nor that the wrong complained of was irreparable and could not be compensated in damages.

To prevent assessment sale of corporate stock.

Burham v. S. F. F. M. Co., 76 Cal., 26.

To prevent the destruction of growing crops.

Schneider v. Brown, 85 Cal., 205.

To prevent the deposit of debris.

Miller v. Highland Ditch Co., 87 Cal., 430.

To restrain enforcement of judgment.

Thompson v. Laughlin, 91 Cal., 313.

To prevent infringement of trademark ; also to prevent fraud upon public.

Joseph v. Macowsky, 96 Cal., 519.

When Not Granted.

Illustrations.

In aid of trespass, unless it appears the injury will be irreparable and cannot be compensated in damages.

Waldron v. Marsh, 5 Cal., 119.

Affidavit must show how and why the damages would be irreparable; not sufficient to allege generally that it is irreparable.

One Court cannot enjoin the proceedings of another of co-ordinate jurisdiction.

Anthony v. Dunlap, 8 Cal., 26.

Rickett v. Johnson, 8 Cal., 34.

The Court in which the objectionable order was made is the proper one to apply to for relief.

Injunction not granted to prevent opening of road under an unconstitutional act; the remedy at law is sufficient.

Leach v. Day, 27 Cal., 643.

Sale under void execution not enjoined.

Sanchez v. Carriaga, 31 Cal., 170.

Execution, when judgment void on its face, will not be restrained by injunction.

Gates v. Lane, 49 Cal., 266.

Party not entitled to injunction in a case where

he has a plain, speedy and adequate remedy at law.

Richards v. Kirkpatrick, 53 Cal., 433.

Injunction not granted to prevent erection of public bridge where public are amply able to respond in damages.

Bigelow v. City of Los Angeles, 85 Cal., 614.

Equitable circumstances beyond the mere allegation of irreparable injury must be shown—as insolvency, impediments to a judgment at law, or to adequate legal relief, or a threatened destruction of the property, or the like.

Burnett v. Whitesides, 13 Cal., 156.

Public nuisances enjoined at instance of private party only where specific injury is shown.

Crowley v. Davis, 63 Cal., 460.

To restrain supervisors from incurring liability not a proper charge upon the county.

Linden v. Case, 46 Cal., 172.

Difference Between Mandatory and Prohibitory.

Code definition of injunction omits the mandatory ingredient.

Gardner v. Stroever, 81 Cal., 148.

Mandatory injunction seldom granted; very strong and urgent case necessary.

Id.

Kinds.

Ex parte restraining order;

Temporary or preliminary *pendente lite* upon notice or order to show cause.

Permanent.

Granting or dissolving the restraining order or temporary injunction is largely a matter in the discretion of the lower Court; not generally interfered with unless abuse apparent.

Parrot *v.* Floyd, 54 Cal., 534.

How Served.

In same manner as summons.

Edmonson *v.* Mason, 16 Cal., 386.

Steps Necessary.

Sworn complaint or affidavit.

C. C. P., 527.

Bond.

C. C. P., 529.

Motion to vacate.

C. C. P., 532-3.

Forms.

Dangers.

Liability upon the bond.

Counsel fees could be recovered on injunction bond.

Ah Thaie *v.* Quan Wan, 3 Cal., 216.

V.

ATTACHMENT.

C. C. P., 537 to 559.

VI.

RECEIVERS.

C. C. P., 304; 564-69; 1,270.

VII.

DEPOSIT IN COURT.

C. C. P., 572-4.

VIII.

INTERLOCUTORY JUDGMENTS.

Hayne on N. T. and Appeals, Arts. 184-186.

IX.

REFERENCES.

In disbarment proceedings.

C. C. P., 298.

Before Court commissioner.

C. C. P., 259, Subdivision 2.

References after judgment.

C. C. P., 636.

General procedure and rules relating to.

C. C. P., 638-645.

SECOND.

PROCEEDINGS SUBSEQUENT TO
JUDGMENT.

STAY.

Definition.

Stay of Execution.

Brief stay customary without bond.

Stay without bond until decision of motion of new trial often granted.

Bond Necessary,

To Obtain Stay Pending Appeal.

On money judgment.

C. C. P., 942.

Judgment for delivery of documents.

C. C. P., 943.

Judgment directing execution of conveyance.

C. C. P., 944.

Judgment concerning real property.

C. C. P., 945.

Judgment concerning perishable property.

C. C. P., 949.

Other cases.

C. C. P., 949.



Stay of Proceedings.

C. C. P., 946.

Costs.

C. C. P., 1,021-1,039.

Attorneys' fees not allowed as costs.

C. C. P., 1,021.

Costs allowed plaintiff of course upon a judgment in his favor, in what cases.

C. C. P., 1,022.

Costs allowed defendant of course upon judgment in his favor, in what cases.

C. C. P., 1,024.

In other cases discretionary.

C. C. P., 1,025.

Generally discretionary in equity cases.

Costs as condition of amendment.

C. C. P., 473.

Tender to prevent costs.

C. C. P., 1,030.

Percentage in San Francisco.

Statutes 1866, page 66.

Cost Bill.

C. C. P., 1,033.

Taxing costs.

Id.

Illustrations.

Customary Items.

- Clerk's fees, filing complaint.
- Notary fees affidavit to complaint.
- Recording *lis pendens*.
- Abstract of title.
- Fees for service of summons.
- Mileage for service of summons.
- Witness fees and mileage.
- Fees for serving subpœnas.
- Mileage for serving subpœnas.
- Jury fees.
- Shorthand reporter's fees.
- Clerk's fees entering judgment.
- Referee's fees.
- Notary's fees affidavit to cost bill.

Special Costs Allowed in Certain Cases.

Execution.

C. C. P., 681-709.

Time of issue.

C. C. P., 681.

Form.

C. C. P., 682.

When returnable.

C. C. P., 683.

To whom issued.

C. C. P., 687.

What liable.

C. C. P., 688.

Exemptions.

C. C. P., 690.

Also homestead.

Civil Code, 1,240.

Also one thousand dollars worth of building
and loan stock.

Statutes 1891, page 256.

C. C., 643.

Method of carrying into effect.

C. C. P., 691-699.

Redemption.

C. C. P., 700-707.

Claims of third parties.

C. C. P., 689.

Writ of assistance.

Montgomery v. Tutt, 11 Cal., 191.

Proceedings in aid of execution.

C. C. P., 714-721.

Consist of the examination of the debtor,
parties owing him and other witnesses, for the
purpose of discovering assets.

Order of examination must be served by
Sheriff.

SYLLABUS OF LECTURE VI.

MAY 10, 1895.

SUBJECT:

THE MOTION FOR NEW TRIAL.

GROUNDS.

PAPERS.

HEARING.

ORDER.

PROCEEDINGS SUBSEQUENT TO JUDGMENT.

(Continued.)

MOTION FOR NEW TRIAL.

C. C. P., 656-662.

In discussing this matter I will draw almost entirely from the excellent work on New Trials and Appeals by the Hon. Robert Y. Hayne.

A new trial may be granted by the Court of its own motion.

Duff *v.* Fisher, 15 Cal., 380.

Hayne, Art. 10, Chapter 662.

Three Stages of Proceeding on Motion for New Trial.

Hayne, Art. 11.

1. Giving notice of intention.
2. Preparation and authentication of papers.
3. Oral motion by counsel in open Court.

I.

Notice of Intention.

a.

Form and contents.

1. Must give notice of intention ;

2. Must designate grounds upon which motion will be made;
3. Must state upon what class of papers or records the motion will be made.

C. C. P., 659.

b.

Time of giving.

1. After verdict and within ten days;
2. Within ten days after notice of decision.

C. C. P., 659.

Grounds.

C. C. P., 657.

IRREGULARITIES IN PROCEEDINGS.

Of Court;

Of jury;

Of adverse party;

Any injurious abuse of discretion.

(C. C. P., 657, Subd. 1.

a. May occur before or during the trial.

Hayne, Art. 25.

b. May occur any time before the record or filing of verdict or decision.

Id.

See *Hastings v. Hastings*, 31 Cal., 95.

c. Must be in a material matter.

d. Burden on moving party to show irregularity; this shown injury is presumed, and the

burden is shifted to the successful party to show that injury did not result.

Com. v. Roby, 12 Pick., 519.

People v. Backus, 5 Cal., 275.

People v. Brannigan, 21 Cal., 339, by Field, Ch. J.

People v. Turner, 39 Cal., 375.

In the last named case a juryman attended a public meeting where the defendant was bitterly denounced.

The above are all criminal cases, but the principle should apply to civil cases.

Hayne, Art. 26, page 97.

Johnson v. Root, 2 Cliff. C. C., 108.

Reason of rule; corrupt practice usually secret and carefully covered up; impossible to enter into juryman's mind and discover effect; any other rule would require a system of espionage upon the jury inconsistent with sound policy.

Hayne, Art. 26, page 98.

Should be brought to the attention of the Court in time to correct, if possible. Silence after injury waives.

Id., Art. 27.

Illustrations of Irregularity.

Of the Court.

Making order in chambers which should be made in open Court.

Bond v. Pacheco, 30 Cal., 532.

Judge acting in a case in which he is disqualified.

Estate of White, 37 Cal., 192.

Court should not try issues of fact while issues of law remain undisposed of.

Hayne, Art. 33.

Refusal of trial by jury where the party has a right to demand it.

Cahoon *v.* Levy, 5 Cal., 294.

General issues should not be submitted to a jury in equity cases.

Wingate *v.* Ferris, 50 Cal., 105.

Brandt *v.* Wheaton, 52 Cal., 434.

The Court should rule on questions of law as they arise.

Practice of admitting evidence subject to subsequent ruling condemned.

Sharp *v.* Lumley, 34 Cal., 614.

Mayo *v.* Marzeaux, 38 Cal., 445.

Change of ruling to prejudice of a party.

Monson *v.* Cooke, 5 Cal., 436.

In this case a referee admitted testimony against objection, and afterwards, without giving the party who offered the testimony a rehearing, excluded the testimony.

Judge expressing opinion as to character of witnesses.

Hayne, Art. 38.

After jury retire the Court should not hold communication with them except in open Court and in the presence of counsel. Neither Judge nor officers of the Court should threaten the jury, for instance: by stating to the jury that, if they do not agree in five minutes, they will have to stay out all night.

Hayne, Art. 39 α .

People v. Hughes, 29 Cal., 258.

Irregularity in Receiving Verdict.

Hayne, Art. 40.

Marquard v. Wheeler, 52 Cal., 445.

In this case the verdict was brought in for an amount "in gold coin," unauthorized; the Court sent out the jury to amend the verdict, and they returned a larger verdict in order to cover the difference between gold coin and legal tender; held an irregularity.

Allowing the jury to have law books while deliberating.

Hayne, Art. 41.

Ford v. Thompson, 19 Cal., 118.

Trying a case in disobedience to the mandate of the Supreme Court.

Argenti v. San Francisco, 30 Cal., 459.

Refusing a party inspection of document when it is offered in evidence by his adversary.

Mitchell v. Hockett, 25 Cal., 539.

Giving the jury in charge of a person not sworn as required by law.

Jones *v.* State, 2 Blackford, 475.

The officer in charge of jury leaving them alone.

People *v.* Moore, 41 Cal., 238.

Irregularity of Jury Distinguished from Misconduct of Jury.

Hayne, Art. 42.

Party having knowledge of irregularity must challenge or waives.

Hayne, Art. 43.

People *v.* Coffman, 24 Cal., 234.

Party must examine the jurors as to competency or cannot afterwards raise the point.

People *v.* Chung Lit, 17 Cal., 322.

If a juror on examination answers falsely as to his qualifications, and this is discovered after trial, it is ground for new trial.

Hayne, Art. 45.

People *v.* Plummer, 9 Cal., 312.

Since overruled as to criminal cases by

People *v.* Fair, 43 Cal., 145;

But is probably the law as to civil cases.

In People *v.* Plummer, two jurymen who had passed satisfactory examinations were afterwards

discovered to have said that the people should take the defendant out of jail and hang him, etc.

Irregularity of Adverse Party.

Hayne, Chapter VI.

- a. Attempts to pack the jury.
- b. Attempts to influence the jury.
- c. Attempts to suppress or manufacture evidence.

Irregularities in Argument.

- a. Attempts to get before the jury facts not in evidence.
- b. Attempts to get the jury to take instructions as to the law from other sources than from the Judge.
- c. Objection to such irregularities to be made at the time they occur.

And the Court to interpose.

Abuse of Discretion.

Hayne, Chapters VIII and IX.

As to Amendment and Continuance.

Misconduct of Jury.

C. C. P., 657, Subdv. 2.

Hayne, Chapter X.

Sleeping during the trial.

Jurymen under the influence of liquor and on the verge of delirium tremens.

Taking forbidden documents to the jury room.

Receiving information through improper channels.

Holding communications with third persons during the trial or while deliberating.

Jurymen drinking liquor.

In *People v. Gray*, 61 Cal., 164, it appears that during confinement beginning in the evening of June 3d and ending on the morning of June 12th, the jury procured at their own expense and consumed from time to time seventeen and a-half gallons of beer, two gallons of wine and three bottles of claret and some whiskey at each meal; a new trial was granted because it appeared that this improper imbibing incapacitated one of the jurors.

Arrival at verdict by chance.

Hayne, Art. 71.

Donner vs. Palmer, 23 Cal., 47.

In this case two jurors unable to agree tossed a coin and agreed by rule of heads and tails; verdict set aside.

Levy v. Brannan, 39 Cal., 489.

In this case the jurymen drew straws as to whether a verdict should be \$1,500 or \$1,000, and

the long straw was drawn and the verdict was made \$1,500. Verdict set aside.

Any course which does away with mutual consultation and mutual deliberation is bad.

For instance: where each juryman sets down an amount and they are added together under an agreement among the jurymen that the quotient will be taken as the verdict. The verdict so arrived at will be set aside.

Wilson v. Berryman, 5 Cal., 45.

Impeaching Verdict by Evidence of Jurymen.

Cannot be done except where verdict is arrived at by chance.

Hayne, Art. 73.

Verdict may be sustained by the evidence of jurymen.

Hayne, Art. 74.

Acccident, Surprise, Etc.

C. C. P., 657, Subd. 3.

Hayne, Chapter XI.

Sudden illness of attorney.

Excusable want of preparation for trial.

Unexpected evidence of witnesses.

Surprise at testimony of one's own witnesses.

Surprise at evidence introduced by adverse party.

Inadvertence or Unforeseen Rulings.

For instance: where a document is introduced in evidence on two previous trials suddenly ruled out and the party not permitted time to get other evidence.

Negligence or ignorance of the law cannot avail the party surprised.

Should apply for continuance.

Hayne, Art. 84.

It must be shown that a different result would be likely on a new trial.

Id., Art. 85.

Newly Discovered Evidence.

C. C. P., Sec. 657, Sub. 4.

Hayne, Ch. XII.

1. The evidence, and not merely its materiality, must be newly discovered. (*Berry v. Metzler*, 7 Cal., 418.)

2. Must not be merely cumulative. (*Millard v. Hathaway*, 27 Cal., 147.)

Definition of cumulative evidence, C. C. P., Sec. 1,838. It is: "Additional evidence of the same character to the same point."

3. Must be such as would render a different result probable in case of a new trial. (*Merk v. Gelzhaeuzer*, 50 Cal., 632.)

4. Reasonable diligence must have been used in preparing for the trial. (Hayne, Art. 92.)

Reasonable diligence must be affirmatively shown. (People *v.* Ah Ton, 53 Cal., 741.)

5. The facts upon which the motion is based must be shown by the best evidence of which the case admits. (Hayne, Art. 93.)

For example, the fact that the party did not discover that certain witnesses would testify so and so, cannot be proved by affidavits alone of the witnesses that they did not tell the party until after the trial. The affidavit of the party that he did not know must be also introduced. (Baker *v.* Josephs, 16 Cal., 180.)

The party's own affidavit as to what the new witnesses would testify to is not sufficient, it being only hearsay; their own affidavits must be produced. (Jenny Lind Company *v.* Bower, 11 Cal., 199.)

The affidavits must state fully enough what the facts of the case are to show the relevancy of the newly discovered evidence. (People *v.* Voll, 43 Cal., 168.)

Excessive Damages.

C. C. P., Sec. 657, Sub. 5.

Hayne, Ch. XIII.

Must be so excessive as to indicate passion or prejudice.

Illustrations, amounts held not excessive:

Taylor v. California Stage Company, 6 Cal., 229: \$5,000, breaking plaintiff's legs.

Weaver v. Page, 6 Cal., 681: \$15,000 for malicious prosecution.

Aldrich v. Palmer, 24 Cal., 516: \$2,250 for injury to plaintiff's foot, whereby he lost two toes and acquired a permanent limp.

Boyce v. California Stage Company, 25 Cal., 467: \$16,000 for damages of a very serious nature:

Kinsey v. Wallace, 36 Cal., 481: \$7,600 for malicious attachment held excessive, and reduced to \$3,000.

Wilson v. Fitch, 41 Cal., 373: \$7,500 for libel.

Myers v. San Francisco, 42 Cal., 216: \$5,000 for death of child.

Russell v. Dennison, 45 Cal., 340, also 50 Cal., 243: \$7,000, malicious prosecution, first held not excessive, afterwards cut down one-half.

Beeson v. Green Mountain G. M. Co., 57 Cal., 20: \$8,000 to widow for death of husband.

Nehrbas v. C. P. R. R. Co., 62 Cal., 320: \$10,800 to father for death of five children.

(This is the San Lorenzo Crossing case.)

Insufficiency of the Evidence.

C. C. P., Sec. 657, Sub. 6.

Hayne Ch., XIV.

Where there is a conflict the Court will not generally interfere, but if the Court believes the verdict wrong it is its duty to set it aside in spite of conflict.

Curtiss v. Starr, 85 Cal., 376.

That It Is Against Law.

C. C. P., Sec. 657, Sub. 6.

Hayne, Art. 99.

This does not mean that the judgment is against law;

It does not mean that the verdict or other decision is unsupported by the evidence;

It apparently applies to cases where the verdict is against instruction.

Also in some cases said to apply to a case where findings of the Judge are defective in omitting to dispose of some material issue.

Brown v. Burbank, 59 Cal., 535.

Errors in Law Occurring at the Trial.

C. C. P., Sec. 657, Sub. 7.

Hayne, Ch. XVI, XVII, XVIII.

Improper ruling as to admissibility of evidence.

Exception must be specific and pointed.

Erroneous ruling may be corrected later.

Erroneous ruling on motion for non-suit.

Erroneous instructions.

- Instructions must not submit matters of law.
 Must not charge as to matters of fact.
 Must not express opinion as to credibility of witness.
 Must not charge as to irrelevant principles of law.
 Instructions must not be contradictory.
 Refusal to charge.
 Objections to instructions and refusals to instruct must be specific, and must be made before the jury retires.

II.

PREPARATION AND AUTHENTICATION OF PAPERS.

- Affidavits.
 Bill of Exceptions.
 Statement of the Case.
 C. C. P., 659.

III.

THE HEARING.

C. C. P., 660.

Order Disposing of the Motion.

Hayne, Ch. XXII.

The Court may grant or refuse new trial on conditions, that is, imposing terms.

Rice *v.* Gashirie, 13 Cal., 54; also People *v.* Burns, 78 Cal., 645.

Form of order granting a new trial.

Better to have it general.

If it is specific and the grounds are wrong, it may be set aside, though this rule is not absolute.

Effect of granting.

Sets aside the judgment and verdict.

If an appeal is pending from the judgment the appeal falls.

SYLLABUS OF LECTURE VII.

MAY 15, 1895.

SUBJECT:

APPEAL.

THE SUPREME COURT.

ITS OFFICERS, RECORDS AND FILES.

PROCEDURE.

BEFORE AND AFTER JUDGMENT.

APPEAL.

I.

From inferior tribunals to the Superior Court.
(C. C. P., Secs. 974 to 980.)

In practice such an appeal is usually a trial *de novo.*

II.

To the Supreme Court.

A.

The Constitution and jurisdiction of the Supreme Court has already been dealt with. (See Lecture II.)

B.

Officers of the Supreme Court.

(Aside from the Judges.)

Clerk.

Constitution, Art. VI, Sec. 14; Pol. Code,
Secs. 749, 750, 752-757.

Deputy Clerks.

Pol. Code, Secs. 751, 756.

The Clerk of the Supreme Court is elected by the people.

Constitution, Art. VI, Sec. 14.

Two Secretaries and two Bailiffs appointed by the Court.

C. C. P., Secs. 265, 266.

Phonographic Reporters.

Pol. Code, Sec. 770.

Reporter of Decisions, appointed by the Governor.

Pol. Code, Secs. 767, 771-778.

The Justices supervise the preparation of reports and may change and correct the proof sheets.

Pol. Code, 774, 775.

The reports are to be published under the supervision of the Secretary of State by contract.

Pol. Code, Secs. 778-782.

C.

Records and Files.

In the custody of the Clerk.

Record Books.

General Analytical Index. Description, purposes, illustration.

Register. Description, purposes, illustration.

County Book, also called Calendar.

Rough Minute Books ; Engrossed or Smooth Minute Book. Description, purposes and illustration.

Manifold Book. Description, purposes and illustration.

Judgment Book. Description, purposes and illustration.

Remittitur Book. Description, purposes and illustration.

Decisions.

History of "California Decisions." (Williamson *v.* Tobey.)

The Files.

Stipulations.

Writs.

Orders.

The transcript.

Briefs, or points and authorities.

Petition for re-hearing.

Decisions.

D.

In what cases appeals may be taken to the Supreme Court.

C. C. P., 963.

E.

Time within which appeal must be taken.

C. C. P., Sec. 939.

F.

Parties to appeal.

Any aggrieved party may appeal.

Party appealing known as the appellant.

Adverse party known as the respondent.

C. C. P., Sec. 938.

THE JUDGMENT.

All proceedings on appeal properly grouped and classified about the judgment.

Of What the Judgment May Consist.

C. C. P., Sec. 53.

May affirm, or reverse, or modify any judgment or order appealed from, and may direct a proper judgment or order to be entered, or direct a new trial or further proceedings to be had.

ONE.

Proceedings Prior to Judgment.

I.

Proceedings in the Lower Court.

1. To give the Supreme Court jurisdiction.
 - a. Notice of appeal.
 - b. Undertaking to perfect appeal.
2. To preserve the *status quo* pending appeal.
 - a. Method of staying proceedings.
 - b. Method of staying execution.
3. To properly present the questions involved to the Appellate Court.
 - a. Making up the transcript.
 - b. Authentication of the transcript.

II.

Proceedings in the Supreme Court.

- I. Filing transcript.

2. Motions to dismiss.
3. Motions for diminution of record.
4. Briefs.
5. Argument and submission.

TWO.

Proceedings Subsequent to Judgment.

I.

Proceedings in the Supreme Court.

- a. Petition for rehearing.
- b. Rehearing.
- c. Remittitur.

II.

Proceedings in the Lower Court.

- a. Costs.
- b. Carrying the remittitur into effect.

ONE.

Proceedings Prior to Judgment.

I.

Proceedings in the Lower Court.

I.

To give the Supreme Court jurisdiction.

- a. Notice of appeal.
C. C. P., Sec. 940.

Form.

Contents.

May contain appeals from several orders in the same case, but must clearly distinguish each.

People v. Center, 61 Cal., 191.

On whom served.

The only safe rule is to serve on all the parties; although lack of service upon a party who is in no way interested in the appeal, and would not be affected by an alteration of the judgment, is held unnecessary; but there is too great risk in assuming to decide such a question.

If necessary party not served, appeal will be dismissed.

Service must be upon attorney of record.

C. C. P., Sec. 1,015.

Service upon attorney other than attorney of record is not sufficient.

Whittle v. Renner, 55 Cal., 395.

Effect of death of party before service of notice of appeal revokes his attorney's authority; service on former attorney insufficient.

Judson v. Love, 35 Cal., 463.

Failure to serve on a necessary party may render the appeal ineffectual only as to him;

But may invalidate the entire appeal.

Senter v. De Bernal, 38 Cal., 640.

Manner of service.

C. C. P., Secs. 1011-1013.

Proof of service.

Ibid.

b. \$300 undertaking for costs and damages.

C. C. P., 940.

Time within which must be filed.

Ibid.

Must have two sureties.

C. C. P., 941.

Contents; must undertake to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on the dismissal thereof, not exceeding \$300.

One undertaking for two appeals.

This is allowable in a case of appeal from judgment and order denying or granting motion for new trial.

Chester *v.* Bakersfield Town Hall Association, 64 Cal., 42.

But not in other cases.

See Corcoran *v.* Desmond, 71 Cal., 100.

If bond is defective, new bond may be filed in the Supreme Court.

C. C. P., Sec. 954; Hayne, Art. 214.

II.

To preserve the *status quo* pending appeal.

Undertakings to stay proceedings and stay execution.

- a. Undertakings to stay proceedings.
- b. Undertakings to stay execution.

This has already been treated of.

III.

For the purpose of properly presenting to the Appellate Court the questions involved.

The record on appeal.

Making up the transcript.

The transcript is the duly authenticated copy of the record below.

Hayne, Art. 265.

Papers necessary on appeal from judgment.

C. C. P., Sec. 950.

On appeal from judgment on appeal or order not order granting or denying motion for new trial.

C. C. P., Sec. 951.

On appeal from order granting or denying motion for new trial.

C. C. P., Sec. 952.

Methods of certifying copies and undertakings.

C. C. P., 953.

Rules as to the contents of transcripts.

Hayne, Art. 265.

i. Must not contain any paper which is not a part of the record on appeal ; such papers, if inserted, are disregarded.

2. Must contain all papers which constitute the record on appeal, and, if not, motion to dismiss may be made.

3. Papers may be abbreviated and condensed.
(See rules as to all this laid down by Sawyer, J., in Estate of Boyd, 25 Cal., 513; and Marriner *v.* Smith, 27 Cal., 653.)

Clerk cannot certify to abstract of records, except as to formal parts, such as titles, etc.

Can be omitted only by stipulation of the parties.

The transcript must be complete in itself, and cannot be helped by reference to a transcript in another case.

Hayne, Art. 266; Gates *v.* Walker, 35 Cal., 290.

Rules of Supreme Court.

As to the manner of printing transcript.
Rule 7.

As to index and arrangement, Rule 8.

As to authentication and service, Rule 11.

As to time of filing, Rule 2, Sub. 1.

Extension of time, Rule 2, Sub. 3.

Evidence of service, Rule 2, Sub. 2.

Number of copies to be filed, Rule 2, Sub. 6.

II.

Proceedings in the Supreme Court.

I. *a.* Filing transcript.

See rules above cited.

b. Motions to dismiss.

See Supreme Court Rules 5 and 6.

Grounds for dismissal. Illustrations.

Hayne, Art. 272.

Appeal on matter not within the Court's appellate jurisdiction.

Stone *v.* Elkins, 24 Cal., 125.

Appeal not taken within the time allowed by non-appealable law.

From non-appealable order or judgment.

Larrabee *v.* Selby, 52 Cal., 508.

Appeal in the name of a dead man.

Sheldon *v.* Dalton, 57 Cal., 19.

Second appeal taken while prior appeal on the same matter still pending.

Hill *v.* Finnegan, 54 Cal., 312.

Transcript not filed in accordance with the rules.

Hayne, Art. 273.

No appearance when cause called for argument.

Ibid., 278.

c. Objections to transcript; diminution of record.

Hayne, Arts. 270, 271; Supreme Court Rules 14-15.

d. Briefs, or points and authorities.

Supreme Court Rule 2, Sub. 4, Sub. 5.

Sub. 6; Rule 12, Sub. 2; Rule 18.

e. Oral argument and submission.

Supreme Court Rules 3 and 19.

Certain Familiar Rules Governing the Supreme Courts in Considering and Deciding Cases Submitted to it.

Hayne, Arts. 278-294.

A party who does not appeal cannot avail himself of errors in the record, or be affected by an appeal to which he is not a party.

Hayne, Art. 281.

A party will not be heard on appeal from a judgment or order to which he consented in the lower Court.

Ibid., Art. 282.

The Supreme Court is confined to the record before it, which it has no power to change.

Ibid., Art. 283.

A decision which is right will not be reversed because based upon a wrong reason.

Ibid., Art. 284.

If it does not appear upon what ground the decision was made, it will be presumed to have been made upon a ground which can be supported.

Ibid.

The presumption is in favor of the action of the Court below, and the party alleging error must make it affirmatively appear.

Ibid., Art. 285.

A judgment or order will not be reversed for errors which were not injurious to the appellant.

Ibid., Art. 286.

Where error is shown injury is presumed, unless the contrary appears affirmatively.

Ibid., Art. 287.

Where there is a substantial conflict in the evidence the Supreme Court will not disturb the decision of the Court below.

Ibid., Art. 288.

An exercise of the discretion of the Court below will be disturbed only when abused.

Ibid., Art. 289.

Stare Decisis.

This rule is that which binds a Court to follow its previous decisions. It is based upon the principle that the certainty of the rule is of more importance than the reason of it. The rule is one of policy, not unbending.

Ibid., Art. 290.

If a decision be clearly erroneous, and rights have not grown up under it to any extent, it may be reversed.

Law of the Case.

However erroneous the decision of the Court may be, it must be adhered to in all subsequent stages of the same case.

Ibid., Art. 291.

Damages for frivolous appeal.

C. C. P., Sec. 957.

TWO.

1. Proceedings Subsequent to Judgment.

1. Proceedings in the Supreme Court.

a. Petition for rehearing.

Supreme Court Rule 28, 30.

b. Rehearing.

c. Remittitur. Form and illustration.

2. Proceedings in the Court below.

A.

Costs.

In discretion of the Appellate Court.

C. C. P., Sec. 1,027.

In other cases.

See Supreme Court Rule 23.

Cost bill.

C. C. P., Sec. 1,034.

Chief Items.

Clerk's fees.

Printing of Transcript.

Attorney's fees and costs of printing briefs cannot be recovered.

Motion to retax may be made in the Court below.

B.**Carrying the Remittitur into Effect.**

Duties of clerks as to entries.

C. C. P., Sec. 958.

SYLLABUS OF LECTURE VIII.

MAY 17, 1895.

SUBJECT:

EXTRAORDINARY METHODS OF REVIEW.

SPECIAL PROCEEDINGS.

CERTIORARI.

MANDAMUS.

PROHIBITION.

CONCLUSION.

Extraordinary or Summary Methods of Review,

AS DISTINGUISHED FROM NEW TRIAL AND APPEAL, INCLUDED UNDER "SPECIAL PROCEEDINGS" IN THE CODE.

SPECIAL PROCEEDINGS.

Certiorari, mandamus, prohibition.

C. C. P., Secs. 1,067-1,110.

Election contests.

C. C. P., Secs. 1,111-1,127.

Summary proceedings.

C. C. P., Secs. 1,132-1,179.

Enforcing liens.

C. C. P., Secs. 1,180-1,206.

Contempt proceedings.

C. C. P., Secs. 1,209-1,222.

Voluntary dissolution of corporations.

C. C. P., Secs. 1,227-1,233.

Eminent domain.

C. C. P., Secs. 1,237-1,263.

Escheated estates.

C. C. P., Secs. 1,269-1,272.

Proceedings to change name.

C. C. P., Secs. 1,275-1,279.

Arbitration.

C. C. P., Secs. 1,281-1,280.

Probate proceedings.

C. C. P., Secs. 1,294-1,809.

Proceedings for appointment of sole trader.

C. C. P., Secs. 1,811-1,821.

Insolvency proceedings.

C. C. P., Sec. 1,822.

Criticism of the Code Definitions, Arrangement and Classification in this Particular.

The Division of the Code devoted to "Special Proceedings" opens with the following definition : "The party prosecuting a special proceeding is known as the plaintiff, and the adverse party as the defendant."

C. C. P., Sec. 1,063.

This has no sense or meaning in connection with, or application to, the following, which the Code, nevertheless, classifies as "Special Proceedings," namely :

Contempt.

Voluntary Dissolution of Corporation.

Escheating Estates.

Change of Name.

Arbitration.

Probate Proceedings.

Sole Tradership Proceedings.

Insolvency.

The Code classifies under "Special Proceedings" the following incongruous classes of proceedings :

Extraordinary Methods of Review, including Certiorari, Mandamus and Prohibition.

Actions for special purposes ; for instance, unlawful and forcible entry and detainer ; actions to enforce liens of mechanics and material men ; contested elections ; eminent domain ;

If these actions are properly called "Special Proceedings," certiorari, mandamus and prohibition certainly should not be, for they are entirely unlike in purpose and form.

(Query : Why should not actions to enforce liens against ships be put here ? See C. C. P., Secs. 813-827.)

Most of the sections of the Code of Civil Procedure relative to these matters belong in the Civil Code ; they establish substantive rights, which, being determined, are enforceable by ordinary actions.

Actions in Rem ;

For instance : Voluntary dissolution of corporation, escheated estates, change of name, pro-

bate proceedings, sole tradership and insolvency proceedings.

(Query: Why are not *quo warranto* proceedings classified here? See C. C. P., Secs. 802-810.)

They are as much "Special Proceedings" as an election contest; they are used, for instance, to enforce dissolution of a corporation; why should they not be classified where voluntary proceedings for dissolution of corporation are placed?

Confession of judgment, Submission of cause on statement, Arbitration.

Contempt Proceedings, Proceedings to Discharge Prisoner.

These have no place under "Special Proceedings;" the former belongs under the Powers of the Courts, the latter under Executions, or Arrest and Bail. If properly placed here, then why should not Habeas Corpus proceedings be classified here?

These outlines deal in detail only with summary methods of review, including:

Certiorari.

Mandamus.

Prohibition.

Writ of Error.

Other Supreme Court Writs.

WRIT OF REVIEW OR CERTIORARI.

C. C. P., Secs. 1,067-1,077.

What Courts Have Jurisdiction.

The Supreme Court.

Constitution, Art. VI, Sec. 4.

C. C. P., Secs. 51 ; 1,068.

The Superior Court.

Constitution, Art. VI, Sec. 5.

C. C. P., Sec. 76, Sub. 5.

Proceedings Grouped About the Judgment.

Purpose of the Judgment in Review, or Certiorari Proceedings.

To affirm, annul or modify proceedings of an inferior tribunal, board or officer.

Loose definition in the Code.

C. C. P., Sec. 1,068.

According to it, the writ ought not to issue unless the tribunal had actually *exceeded* its jurisdiction, in which case there could not be a judgment affirming the action of the tribunal.

I.

Proceedings Prior to Judgment.

- a. The application, its form and contents.
- b. Notice, or order to show cause ; form, contents and service.

- c. The writ ; form, contents, service and return.
- d. The return ; form and contents.
- e. The hearing.

II.

Proceedings Subsequent to Judgment.

- a. Transmission of judgment to the tribunal, board or officer affected.
- b. Appeal.

I.

Proceedings Prior to Judgment.

A.

The Application.

Contents.

- 1. Title of the Court.
- 2. Title of the cause.

Names of parties.

Plaintiff is the party beneficially interested.

C. C. P., Sec. 1,069.

The party defendant.

- a. An inferior tribunal, as a Court or a Judge.

Purely ministerial act of the Judge is not reviewable on certiorari.

People *v.* Bush, 40 Cal., 344.

Judge's appointment to fill a vacancy in Board of Supervisors not reviewable.

- b. Board. For instance, Board of Supervisors.
People v. Supervisors of El Dorado County, 8 Cal., 61. Action of Supervisors allowing a claim against the county reviewed.
- c. Officer. For instance, Board of Equalization.
People v. Goldtree, 44 Cal., 325. In this case a modification of an assessment was reviewed.

Board of Education.

People v. State Board of Education, 49 Cal., 684. The action of the State Board of Education changing the text books was annulled.

City Assessor.

People v. Bond, 10 Cal., 563. Action of a City Assessor in adding an unauthorized item to the tax list annulled on certiorari.

3. Statement of the Case.

Requisites.

Must show

That the act to be reviewed was in excess of the defendant's jurisdiction.

C. C. P., Sec. 1,068.

That the act was done in exercise of judicial and not ministerial functions.

Ibid.

That it is not sought merely to correct errors or irregularities.

Ibid., Sec. 1,068; *Dezerillo v. Superior Court*, 59 Cal., 180. In this case an attempt was made to review an order of the Superior Court striking out the bill of costs.

That there is no appeal.

C. C. P., Sec. 1,068. *Gray v. Schupp*, 4 Cal., 186.

That there is no plain, speedy and adequate remedy at law.

4. Verification ; must be by affidavit.

C. C. P., Sec. 1,069.

B.

The Notice or Order to Show Cause.

C. C. P., Sec. 1,069.

C.

The Writ.

1. To whom directed. The tribunal, board or officer, or any other person having custody of the record or proceeding to be reviewed.

2. Command.

C C. P., Sec. 1,071.

Requires defendant to certify full transcript of

the proceedings to be reviewed to the Court issuing the writ, at a specified time and place.

3. Stay.

May be omitted.

C. C. P., Sec. 1,072.

Service of the Writ.

Like a Summons unless otherwise directed.

C. C. P., Sec. 1,073.

D.

The Return.

C. C. P., Secs. 1,070, 1,071, 1,075.

E.

The Hearing.

C. C. P., Sec. 1,075.

Limits ; cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.

II.

Proceedings Subsequent to Judgment.

A.

Transmission of the Judgment to the Defendant.

C. C. P., Sec. 1,076.

B.

Appeal.

C. C. P., Sec. 939.

Judgment roll.

C. C. P., Sec. 1,077.

Recent illustration: Matter of Shorridge, 99 Cal, 526, proceedings of Superior Court of Santa Clara County fining publisher of the San Jose *Mercury* for violating an order prohibiting publication of divorce proceedings set aside and annulled on certiorari as an unconstitutional interference with the right of free speech and the liberty of the press.

THE WRIT OF MANDAMUS.

C. C. P., Secs. 1,084-1,097.

What Courts Have Jurisdiction.

Any Court except Justices' or Police Court.

Constitution, Art. VI, Secs. 4 and 5.

C. C. P., Secs. 50, 51, 75-79; 1,085.

Proceedings Grouped About the Judgment.

The purpose of the judgment.

To compel any inferior tribunal, corporation, board or person to perform an act which the law specially enjoins as a duty resulting from office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is un-

lawfully precluded by such inferior tribunal, corporation, board or person.

C. C. P., Sec. 1,085.

I.

Proceedings Prior to Judgment.

I.

- a. Application ; its form and contents.
- b. Notice.
- c. The writ ; its kinds, form and contents.
- d. Manner of service.
- e. The answer ; its form and contents.
- f. Objections to the answer.
- g. The trial.

II.

Proceedings Subsequent to Judgment.

- a. Reference to determine damages.
- b. Costs.
- c. Execution.
- d. Peremptory mandate.
- e. Method of enforcement.
- f. New trial.
- g. Appeal.

I.

Proceedings Prior to Judgment.*A.***Application.****Contents.**

1. Title of Court.

2. Title of cause.

Names of the parties.

The plaintiff is the party beneficially interested.

C. C. P., Sec. 1,086.

The defendant.

Inferior tribunal.

Corporation.

Board.

Person.

C. C. P., Sec. 1,085.

Does not issue to a private person, but only to a person or body exercising public or *quasi* public functions.

Hayne, Art. 322.

"No officer, however high, is above the law, and when duties are imposed upon him in regard to which he has no discretion, and in the exercise of which individuals have a direct pecuniary interest, and there is no other plain, speedy and ade-

quate remedy, he can be required to perform those duties by compulsory process of mandamus."

Field, C. J., in *McCauley v. Brooks*, 16 Cal., 41.

Illustrations.

Secretary of State of the United States.

Marbury v. Madison, 1 Cranch., 137.

Postmaster General of the United States.

Kendall v. United States, 12 Peters, 524.

The Secretary of the Interior.

United States v. Schurz, 12 Otto, 379.

City Council.

Bishop v. Oakland, 58 Cal., 574.

A Judge.

Harper v. Freelon, 6 Cal., 76.

Directors of the Hastings' Law School.

Foltz v. Hoge, 54 Cal., 28.

President and Secretary of a private corporation.

People v. Crockett, 9 Cal., 113.

3. Statement of the case

Must show

That the purpose of the writ is not to revise discretion or control judicial action.

Tilden v. Sacramento County, 41 Cal., 72.

That there is no plain, speedy and adequate remedy at law.

C. C. P., Sec. 1,086; *Kimball v. Union Water Co.*, 44 Cal., 175.

That there has been a demand and a refusal to perform the act.

People v. Romero, 18 Cal., 91.

That the purpose is to enforce an act enjoined by law.

C. C. P., Sec. 1,085.

Verification;

Must be by affidavit.

C. C. P., Sec. 1,086.

B.

The Notice.

C. C. P., Secs. 1,087-1,088.

C.

The Writ.

Alternative and peremptory.

Ibid.

D.

Method of Service.

C. C. P., Sec. 1,096.

E.

The Answer.

C. C. P., Sec. 1,089.

Must be under oath.

Ibid.

F.

Objections to Answer.

C. C. P., Sec. 1,091.

G.

The Trial.

C. C. P., Sec. 1,089.

Cannot be issued by default.

C. C. P., Sec. 1,088.

II.

Proceedings Subsequent to Judgment.

a. Assessment of damages.

C. C. P., Sec. 1,090, 1,095.

b. Costs.

C. C. P., Sec. 1,095.

c. Execution.*Ibid.**d.* Peremptory writ without delay.*Ibid.**e.* Method of enforcement.

Fine.

Imprisonment.

Supplemental orders.

C. C. P., Sec. 1,095.

f. New trial.

C. C. P., Secs. 1,092, 1,093.

g. Appeal.

C. C. P., Sec. 1,110.



Recent illustrations: Board of Trustees of the Orange Law Library *v.* Supervisors, 99 Cal., 571.

THE WRIT OF PROHIBITION.

C. C. P., 1,102-1,105.

Definition: the counterpart of the writ of mandamus, and arrests the proceedings of a tribunal, corporation, board or person, when such proceedings are in excess of jurisdiction of such tribunal.

Generally speaking, the same rules apply and practice prevails as in the case of the writ of mandamus.

While, generally speaking, the counterpart of the writ of mandamus, it applies only to bodies exercising judicial functions.

In 1881 an amendment to the Code extended the writ to control ministerial acts, as well as judicial functions, but this was held unconstitutional.

Camron v. Kenfield, 57 Cal., 550.

Recent Illustrations.

State Investment Insurance Company *v.* Superior Court, 101 Cal., 135.

Also celebrated People's Home Savings Bank and Pacific Bank cases.

WRIT OF ERROR.

See Hayne.

Other Superior Court Writs.

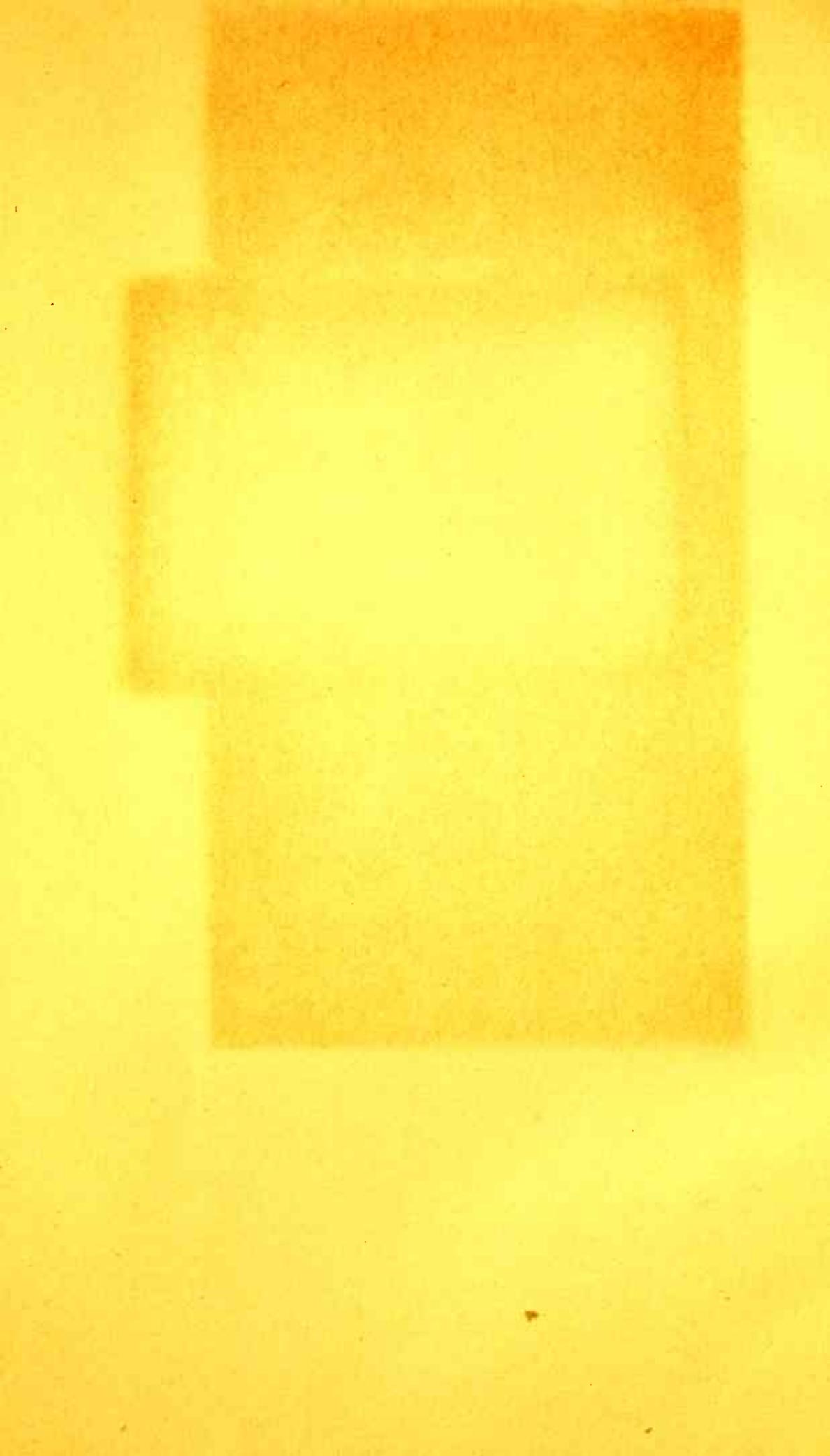
See Hayne.

Recapitulation.

Some Criticisms on the System.

General Considerations.

Conclusion.



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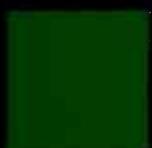
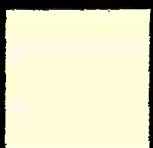
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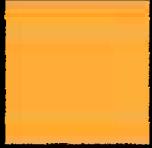
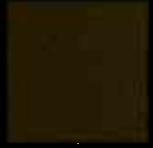
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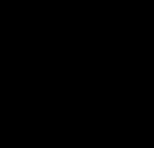
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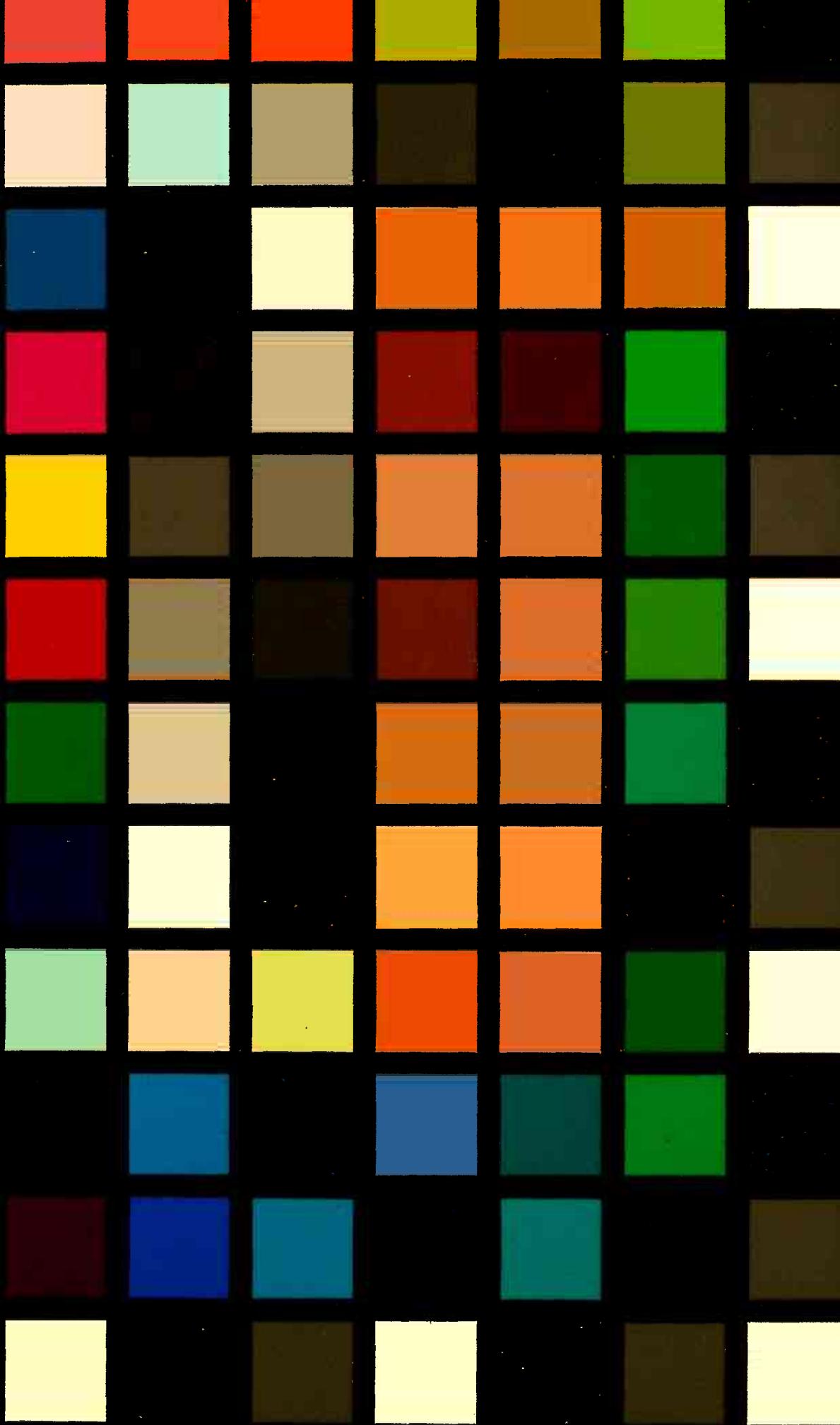


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